

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2014-346-WS

IN RE:)	
)	
Application of Daufuskie Island Utility)	DIUC RESPONSE TO ORS REPORT
Company, Inc. for Approval of an)	
Increase for Water and Sewer Rates,)	
Terms and Conditions.)	
_____)	

Since DIUC initiated this proceeding in 2015 by filing its Application for Approval of an Increase for Water and Sewer Rates, Terms and Conditions, the Commission has conducted two full evidentiary hearings and there have been two appeals to the South Carolina Supreme Court. *See DIUC v. S.C. Office of Reg. Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) (hereinafter “*DIUC I*”) and *DIUC v. S.C. Office Reg. Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019), *reh'g denied* (Sept. 27, 2019) (hereinafter “*DIUC II*”). In both appeals the Supreme Court rejected every single argument put forth by the Office of Regulatory Staff (“ORS”) and in the more recent appeal the Supreme Court chastised ORS for its actions on rehearing with regard to the DIUC’s Rate Case Expenses, finding ORS engaged in “misconduct” and calling ORS’s actions “retaliatory,” “deeply troubling,” and “unprofessional.” *DIUC II*, 427 S.C. at 460-461 and 832 S.E.2d at 573.

Despite these circumstances ORS continues to obsessively demand more and more unnecessary documents related to the Guastella Associates, Inc. (“GA”) rate case expenses while simultaneously attempting to resurrect old arguments about the invoices and the relationship between GA and DIUC. The ORS Report filed on August 21, 2020, is the most recent example of these tactics.

THE REPORT

On August 21, 2020, ORS filed a document captioned as Report Pursuant to Commission Order No. 2020-496. Replete with exaggerated suggestions and unsupported conclusions, the Report is a completely transparent attempt by ORS to present DIUC in a false light and to malign the character and work ethic of John Guastella, all under the guise of doing this Commission's bidding pursuant to Order 2020-796.¹

To the extent that the Report asserts DIUC's discovery responses "do not rise to a level that ORS believes is responsive," the Commission is directed to DIUC's Response to ORS's Motion to Compel, filed September 3, 2020. In that Response DIUC itemizes the following, which it has already provided ORS regarding the Guastella Associates (GA) invoices at issue:

- 1. Documents produced with DIUC's Responses to Office of Regulatory Staff's First Continuing Audit Information Request in Proceeding on Remand dated October 27, 2017;**
- 2. Attachment to ORS 1-12 Rate Case Expenses produced October 27, 2017;**
- 3. Testimony of witnesses and exhibits in Transcript of Proceedings (October 28, 2015);**
- 4. Testimony of witnesses and exhibits in Transcript of Proceedings (December 6 and 7, 2017);**
- 5. Prefiled Second Rehearing Testimony of John F. Guastella (June 16, 2020);**
- 6. Chart entitled GA Rate Case Invoices and Payments to Date;**
- 7. Bank statement excerpts and transfer records corresponding to entries in the chart GA Rate Case Invoices and Payments to Date;**
- 8. Information necessary to address whether any of the invoices were aggregated into a single payment, to assist ORS in tracking the payment to the bank statement;**
- 9. Verified statement that no late fees were paid;**
- 10. Verified statement that no surcharges were paid;**

¹ Notably, Order 2020-796 was limited by its own terms to "whether the previously contested \$542,978 in rate case invoices from Daufuskie Island Utility Company have been paid."

11. **Verified statement that no penalties were paid;**
12. **Verified statement that no interest was paid;**
13. **Verified statement of information regarding approval of the invoices for payment;**
14. **Verified statement of information regarding the individual responsible for processing the payments.**

See DIUC Response with Exhibits A-E. This information is quite literally **everything** that ORS's discovery requests asks for.

In addition to complaining that DIUC has refused to cooperate with the investigation requested by the Commission (which is simply not true given the amount of information provided), the Report goes on to promote a litany of conspiracy theories regarding how DIUC operates. Among the alleged concerns of ORS are the following broad and unsupported conclusions:

- Guastella Associate's ("GA") relationship with DIUC is not at arm's length;
- Previous testimony raises the clear specter that he sits on both sides of the negotiating table, thus further highlighting the substantial concerns about the GA expenses charged to DIUC; and
- Members of GA prepare the invoices to submit to DIUC and then write and approve the checks on behalf of DIUC.

Report at pp.4-5.

First, it should be noted that all of these issues have been previously raised by ORS in this case and already disposed of. Second, they are just conjecture. Nonetheless, attached hereto as *Exhibit A* is the Affidavit of Terry R. Lee, President of DIUC. Among Mr. Lee's statements in response to the Report's allegations are the following, which effectively and completely resolve the questions raised by ORS in its Report:

GA works for DIUC pursuant to a Management Agreement. That agreement is an arm's length agreement that was negotiated between GA and DIUC and its owners. GA did not have any unfair influence. The terms of the retention of GA are

reasonable and incurred in good faith. The Report's suggestion that Mr. Guastella somehow "sits on both sides of the negotiating table" is ridiculous.

Although the Report directs its innuendo at Mr. Guastella and GA, it also implies that I do not properly protect DIUC's owners or customers in carrying out my duties as President of DIUC. That is not correct and should not be a part of any Report filed by a government office.

The ownership of DIUC is, and always has been, satisfied with the level of expert management and rate case and other services provided by GA. The Report seems to suggest that DIUC allows GA or John Guastella to freely make payments to GA without permission or approval of DIUC. That is not accurate.

I am in frequent contact with Mr. Guastella and am informed of all major decisions, including payment of GA invoices. I have access to the books and records and GA frequently updates the owners regarding all relevant matters of management and the status of the rate case.

These systems are part of the arms-length relationship between GA and DIUC. GA keeps the owners informed which allows the company to operate effectively. The owners review GA's reports and updates then seek additional information, if necessary, before making decisions. The owners have the final say in decisions. GA does not operate outside the permission(s) that I grant on behalf of the owners.

GA prepares its rate case invoices and submits them to DIUC. The owners are and have been fully informed as to the amount of GA's rate case charges. The invoices have been paid according to available cash flow. As the manager, GA's personnel write the checks on behalf of DIUC. These checks are, of course, properly recorded in the books so that at any time the owners can review them. There is nothing imprudent about this arrangement or this workflow, which has always been handled properly and in accordance with the management agreement.

DIUC is satisfied with the form and content of the DIUC rate case invoices. The format provides sufficient information for the owners to confirm the scope of work performed and the personnel handling the tasks.

I would also note that over the past four years, GA's willingness to forego payment on significant rate case expenses owed by DIUC is what allowed DIUC to survive. DIUC did not have sufficient cashflow to pay GA and GA waited to be paid. On occasions, GA even provided cash to DIUC in order to meet deadlines of payments due before the owners could infuse cash into DIUC.

Exhibit A, Affidavit of Terry R. Lee, ¶¶7-14.

Responding to questions about the timing of payments raised by ORS in its Motion to Compel, the Affidavit further states:

Since 2008 when DIUC was acquired from Haig Point, Inc. we have faced several unique situations that created major cash flow shortages. After consultation with GA, the owners, at Mr. Guastella's advice, made it a priority to use available cash to provide service to the customers, with charges by GA accrued instead of being paid on a current basis. For that same reason, the owners have never been paid any return on their investment.

GA's delayed payments were booked as accounts payable. DIUC considered them to be due and payable. The fact that payment had to be made in the future does not mean that the costs were not incurred and/or that the costs were not going to be paid.

DIUC could not afford to pay GA invoices until after the first appeal, rehearing, and finally the Order on Rehearing which increased DIUC's rates. After implementing the higher rates DIUC had sufficient income from operations and a refinancing to begin paying its accounts payable to GA. Some invoices were four years old but GA did not charge interest or any late fees to DIUC. Instead, GA and John Guastella never quit fighting to obtain rates sufficient to keep the DIUC viable.

Exhibit A, Affidavit of Terry R. Lee, ¶¶15-17. *See also* DIUC Response to Motion to ORS Motion to Compel (Sept. 9, 2020).

DIUC could not afford to pay GA invoices until after the first appeal, rehearing, and finally the Order on Rehearing, which incrementally increased DIUC's rates. The Commission denied reconsideration of the Order on Rehearing in May of 2018, making the rehearing rates final pending the second appeal. As shown in the chart entitled *GA Rate Case Invoices and Payments to Date*, DIUC did not begin to pay the GA invoices until August of 2018 as the higher rates began to produce sufficient income to begin paying accounts payable to GA. *See DIUC Response to Request 1-1, copy attached to Response to Motion to Compel.* By that time and in the months

following, the case was on appeal to the Supreme Court. There was no reason for DIUC to provide a ledger of payments for GA invoices to ORS until ORS actually asked for it in July of 2020 via Request 1-1. When ORS did ask, DIUC provided the information. The Motion's attempt to turn that timing into something sinister is wholly improper, especially given ORS's knowledge of the complete facts.

ALLOCATING THE \$269,356 TO INVOICES

The application that initiated this proceeding requested a 108.9% increase over the rates authorized pursuant to DIUC's last petition for rate adjustment. *See* Rehearing Transcript at 80. After the first appeal and remand to the Commission, on or about December 2017, DIUC provided testimony that the "current economic realities following remand" require DIUC obtain "a 125.7% increase over the rates authorized pursuant to the last petition for rate adjustment." *Id.* at 79. However, to keep the final rates within the Application's original 108.9% noticed increase, DIUC proposed to leave outstanding that portion of its rate case expenses beyond those that could be included within a 108.9% increase. *See* DIUC's Proposed Order (April 14, 2020) at p.4. Commission Order No. 2018-68 entered January 31, 2018, allowed an 88.5% overall rate increase that was designed to produce combined annual revenues of \$2,023,759, or water revenues of \$1,020,831 and wastewater revenues of \$1,002,928. The Commission can now enter an additional order that approves the \$542,978 of GA rate case charges, consistent with the Court's remand opinion, but include for this decision rate case expense of \$269,356 and still remain within the noticed 108.9% increase and the \$2,267,722 revenue requirement included in DIUC's original application. *See* DIUC's Proposed Order (April 14, 2020) at p.4.

Based on the evidence in the record, DIUC has asked the Commission to find that DIUC has incurred and should be allowed to include rate case expenses of \$269,356 for a portion of GA

fees incurred through September 30, 2017.² That leaves outstanding about one-half of the \$542,978 of GA fees invoiced through September 30, 2017, or \$273,622. DIUC would then apply for recognition of these expenses and its post-September 30, 2017 rate case expenses in its next rate case. *See* DIUC's Proposed Order (April 14, 2020) at p.7. This was also the approach taken by DIUC in its presentation to the Supreme Court in the second appeal. *See* Appellant's Final Brief (January 9, 2019) at pp. 45-46.

DIUC also explained this calculation in its January 16, 2020, Memorandum Summarizing Matters to Be Addressed on Remand wherein DIUC summarized the issues for consideration during this remand as follows:

1. Order 2015-846 Approving the ORS-POAs Settlement and Order 2018-68 on Rehearing both erroneously excluded \$699,631 from DIUC's Utility Plant In Service. More recently, Order 2018-68 purports to rely on ORS testimony but ORS never identified the specific items of plant for the \$699,631. The Commission could not have determined from Audit Exhibit ICG-5 (admitted as Hearing Ex. 18 and Rehearing Ex. 8) or from anything anywhere in the record what items of plant ORS adjusted for "non-allowable plant" or what costs ORS adjusted for "non-allowable plant." Further, DIUC presented testimony regarding the historical facts and accounting basis for its books and records. As such, the excluded \$699,631 worth of DIUC plant assets should be included in DIUC's Utility Plant In Service in accordance with the documentation and testimony in the record from DIUC.
2. Order 2015-846 permitted DIUC to recover Rate Case Expenses for rate case work of its manager, Guastella Associates ("GA"). Based on the existing record, the Commission should apply the same standard thereby including Rate Case Expenses for GA fees incurred through September 30, 2017, up to a total revenue increase not to exceed the noticed 108.9% rate increase. Remaining invoiced fees to GA could be presented for consideration as part of DIUC's next rate proceeding.³

² In so ordering, the Commission would allow DIUC to recover in this case only that portion of its rate case expenses that will, combined with the other adjustments including plant in service as discussed herein, increase total annual revenues up to, but not beyond, the noticed 108.9% increase.

³ Inclusion of \$269,356 for GA fees incurred through September 30, 2017. That would leave outstanding about one-half of the \$542,978 of GA fees invoiced through September 30, 2017, or \$273,662, to be recovered in a subsequent rate proceeding.

Memorandum Summarizing Matters to Be Addressed on Remand (Jan. 16, 2020) at p.1.

DIUC has certainly provided ample explanation for the amount of rate case expenses it seeks to recover in this proceeding. To the extent that ORS wants to assign those costs to specific invoices in order to prevent any future confusion, that can be easily accomplished when reconciling the rates after entry of a final order of the Commission. Despite the Report's allegations to the contrary, that is not a difficult concept; in fact, it will serve all the parties by creating a clear and precise record simultaneously with application of the Commission's rate order.

CONCLUSION

The Report Pursuant to Commission Order No. 2020-496 filed by ORS on August 21, 2020, far exceeds any request of the Commission in Order 2020-496. The issues and allegations raised are not related to production of invoice records. The Report is clearly an attempt to advance ORS's positions, despite the cautions and warnings of the Supreme Court.

Respectfully submitted,

/s/ Thomas P. Gressette Jr.

Thomas P. Gressette, Jr.

Direct: (843) 727-2249

Email: Gressette@WGFLAW.com

G. Trenholm Walker

Direct: (843) 727-2208

Email: Walker@WGFLAW.com

WALKER GRESSETTE FREEMAN & LINTON, LLC

Mail: P.O. Box 22167, Charleston, SC 29413

Office: 66 Hasell Street, Charleston, SC 29401

Phone: (843) 727-2200

September 3, 2020
Charleston, South Carolina

Attachments:

Exhibit A, Affidavit of Terry R. Lee

CERTIFICATE OF SERVICE

This is to certify that on September 3, 2020, I caused to be served upon the counsel of record named below a copy of the foregoing **DIUC RESPONSE TO ORS REPORT** via electronic mail, as indicated. A copy of the Responses were also filed via the Commission's DMS.

Andrew M. Bateman, Esq. (abateman@ors.sc.gov)

Jeff Nelson, Esq. (jnelson@ors.sc.gov)

John J. Pringle, Jr., Esq. (jack.pringle@arlaw.com)

John F. Beach, Esq. (john.beach@arlaw.com)

/s/ Thomas P. Gressette Jr.

Thomas P. Gressette, Jr.